

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ROBRITT LIQUOR STORE, INC.	:	DETERMINATION
AND GEORGE ROBINSON, AS OFFICER	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1982	:	
through May 31, 1985.	:	

Petitioners, Robritt Liquor Store, Inc. and George Robinson, as officer, 1996A Fulton Street, Brooklyn, New York 11233, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through May 31, 1985 (File No. 806354).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 3, 1990 at 9:15 A.M. Petitioners appeared by Leonard L. Fein, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

- I. Whether a purchase-mark up audit is valid when the auditor who observed and reported the prices used to compute the mark up did not testify.
- II. Whether the Division of Tax Appeals has jurisdiction to review a notice and demand issued against petitioner Robritt Liquor Stores, Inc.

FINDINGS OF FACT

(a) Petitioner Robritt Liquor Store, Inc. ("Robritt") operates a small liquor store. It has two adjoining counters protected by bullet-proof glass. The liquor was behind one counter, and the wine behind the other.

(b) Petitioner George Robinson is president of Robritt. He works at the liquor store

for only about two or three hours an evening because he is a full-time salesman for Drake's Bakery.

(c) Joseph Copeland is a cousin of Mr. Robinson and an employee of Robritt.

The store deposits all receipts, and all purchases are paid for by check. Though Robritt had a cash register, it kept no tapes. Its sales tax returns were prepared from deposits. Robritt did keep its purchase invoices. Its accountant at the time was Mr. Mel Schwartzberg of Monsey, Rockland County.

(a) The Federal corporation income tax returns for 1982 reported gross receipts of \$308,067.45 and purchases of \$274,846.03 (no return for 1983 was available at the hearing). For 1984 Robritt reported gross receipts of \$371,371.14 and purchases of \$345,854.19; for 1985 it reported gross receipts of \$327,220.47 and purchases of \$300,244.26.

(b) The purchases as recorded by the Division of Taxation's auditor for 1983 (taken, he asserts, from the Federal tax return) are \$60,000.00 higher than those shown on the workpapers of the accountant who prepared that return. The purchases as shown on the 1984 Federal tax return are \$80,000.00 higher than those shown on the workpapers of the accountant who prepared that return.

(c) The inventory (as recorded in schedule A of the Federal returns) at the beginning of 1982 was \$21,000. The inventory at the end of 1985 was \$44,500, an increase of \$23,500.

(a) An audit was performed by the White Plains District Office based on purchases and a computed mark up.

(b) The amounts of purchases were taken from schedule A of the Federal income tax returns for 1983 and 1984 (\$308,005.00 and \$345,854.00, respectively). For 1982, the amount on the return (\$274,846.03) was prorated for 7/12 of the year. For 1985, the Federal return was not available so purchase invoices were examined for January through May and the amount of \$84,229.34 was arrived at. The total purchases came to \$898,415.22.

(c) A mark up on purchases of 25.67% was computed. This was done by listing all purchases for the month of March 1985 with their total costs. These costs totalled \$19,529.51.

(d) The prices that were charged per bottle were determined by examining the shelves of Robritt and listing such prices. About 240 items were listed by an assistant auditor, Louis Booth, from a different district office (the Brooklyn District Office). These prices were multiplied by the total bottles purchased to arrive at total sales of \$26,567.70. Mr. Joseph Copeland was on duty at Robritt when the auditor came in. As testified to by Mr. Copeland, the auditor spent no more than an hour on the premises. He asked for prices for about 25 items and Mr. Copeland furnished them. The auditor did not himself inspect the shelves.

(e) An 8.25% sales tax component was taken out of total sales leaving \$24,542.91. The difference between this and the computed cost of \$19,529.51 was \$5,013.40 which is 25.67% of that cost.

(f) So as to give an allowance for waste, this markup was reduced to 23%.

(g) The mark up of 23% was applied to the purchases of \$898,415.22 to arrive at a gross profit of \$206,635.49 and gross receipts of \$1,105,050.60. Reported taxable sales of \$826,048.00 were subtracted leaving additional taxable sales of \$279,002.60.

(h) Since additional taxable sales were 33.78% more than reported taxable sales, the reported taxable sales for each quarter were increased by that percentage and these figures were used to calculate interest and penalties.

(i) A use tax of \$33.00 was added for the quarter ending November 30, 1982 for the purchase of a \$400.00 cash register.

A consent extending the period of limitation for assessment of sales and use taxes to March 20, 1986 was signed on September 13, 1985 for the period June 1, 1986 through November 30, 1982.

A consent (Form AU-3) to the fixing of the tax at \$22,806.21 plus penalty and interest payable after issuance of a notice and demand was signed by George Robinson on behalf of Robritt and was received by the Division of Taxation's District Office on February 26, 1986.

A Notice and Demand for Payment of Sales and Use Taxes Due (bearing notice number

S860512120C) was issued against petitioner Robritt Liquor Store Inc. for the period June 1, 1982 through May 31, 1985 on May 12, 1986 for total tax due of \$22,806.21, plus penalty of \$5,209.86 and interest of \$7,031.44, for a total amount due of \$35,047.51.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due (bearing notice number S860512121C) was issued against petitioner George Robinson for the period June 1, 1982 through May 31, 1985 on May 12, 1986 for total tax due of \$22,806.21, plus penalty due of \$5,209.86 and interest of \$7,031.44, for a total amount due of \$35,047.51.

A conciliation conference was conducted on June 2, 1988. The conferee's order dated August 26, 1988 denied the request and sustained the statutory notices. Its caption specified as under review two notice numbers, S860512120C and S860512121C, these being the notice and demand against Robritt and the notice of determination against Mr. Robinson.

An audit performed for the period June 1, 1985 through November 31, 1987 by Stanley Johnson of the Brooklyn District Office showed a mark up of 16.98%.

CONCLUSIONS OF LAW

A. The calculations of the prices and markup must be found to be arbitrary and without foundation in the record. The hearsay evidence in the record is not sufficient to form a basis for such calculation. Since the identity of the auditor whose report is crucial to the Division's audit is known and he is available to testify petitioners could have subpoenaed that auditor to obtain his testimony if they had so desired (Matter of Gray v. Adduci, 73 NY2d 741; Matter of Kucherov v. Chu, 147 AD2d 877). Such evidence can be relied upon to support a finding where

"in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs' (National Labor Relations Bd. v. Remington Rand, 94 F2d 862, 873 [2nd Cir] [Hand, J.], cert denied 304 US 576). Put another way, substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' (300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 NY2d 176, 180)" (Vega v. Smith, 66 NY2d 130, 139).

In this case, however, the declarant's work is impeached by the very specific direct testimony of Robritt's employee. The declarant's veracity cannot be evaluated by the Division of Tax

Appeals except by his appearance at the hearing and the Division of Taxation has not produced him. I must, therefore, reject the offered testimony. Such evidence simply could not be decisive under the standard of the above-cited cases: that it is the kind of evidence on which a board of directors or trustee of a trust is accustomed to rely on in serious affairs. Since this testimony is the only evidence for the calculation of the prices which petitioner charged and the markup based on those prices and it cannot be accepted, it follows that the calculation of the tax due itself has no rational basis. In this event, the tax is arbitrary and must be cancelled (Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990).

B. The Division of Tax Appeals does not have jurisdiction at the present time to review the tax liability of Robritt. Robritt executed a consent (Form AU-3) to the fixing of the tax pursuant to Tax Law § 1138(c) and that tax was fixed by the issuance of a notice and demand. There has been no notice of determination issued under Tax Law § 1138(a)(1) which could be reviewed by this Division. Robritt, of course, has a right under Tax Law § 1139(c) to claim a refund. This can be done, however, only after all of the taxes due pursuant to the notice and demand have been paid (Matter of Eastern Tier Carrier Corporation, Tax Appeals Tribunal, December 6, 1990). Since a hearing on Robritt's case would presumably be controlled, under ordinary principles of collateral estoppel, by the results in this case the result should be in Robritt's favor (B. R. DeWitt, Inc. v. Hall, 19 NY2d 141; Rock v. Capitol Air, Inc., 128 AD2d 691). In view of this, the payment of the tax may be merely an empty formality. It is, however, specifically required by the statute. It could be avoided presumably by the action of the Commissioner of Taxation and Finance under Tax Law § 1138(a)(1) to redetermine the tax on his own motion. This would presumably be subject to judicial review (compare Tax Law § 697[d]; Matter of Mobil Oil Corp. v. Commissioner of Finance, 101 AD2d 723).

C. The petition of George Robinson, as officer, is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1986 is cancelled.

D. The petition of Robritt Liquor Store, Inc. is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE